

NO. 20,893 ✓

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3380*

United States Court of Appeals

NINTH CIRCUIT

MICHELE MARCHESE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JESSE DEL BONO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

FILED

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Appeal from the United States District Court
for the Central District of California.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Appellants Michele Marchese and Jesse Del Bono petition the Court for a rehearing of its decision of May 25, 1967, and pursuant to Rule 23 of this Court, appellants respectfully suggest that the rehearing be *en banc*. Said petitions and suggestion are made on the following grounds:

I. THIS COURT, FOR THE FIRST TIME PASSING UPON THE QUESTION OF THE USE OF THE ELECTRONIC TRANSMITTING DEVICE, ERRONEOUSLY HELD THAT THE USE OF SUCH DEVICE WAS PERMISSIBLE.

The Court based its decision on the case of *Osborn v. United States*, 385 U.S. 323, which was clearly inapposite and distinguishable from the instant case. In *Osborn* no transmitting device was used. Instead, there was concealed on a police officer, under the prior authorization and supervision of judges of the United States District Court, a hidden recorder. The tape and the transcription of the conversation so recorded between the officer and the defendant were used to corroborate the officer's testimony in the trial of the defendant for bribery, and as the Court stated, the recording "provided strong corroboration of the truth of the charge against petitioner" and:

"The issue here, therefore, is not the permissibility of 'indiscriminate use of such devices in law enforcement' but the permissibility of using such device under the most precise and discriminate circumstances, . . . We deal here not with surreptitious surveillance of a private conversation by an outsider (cf. *Silverman v. United States*, 385 U.S. 505) but, as in *Lopez v. United States*, 373 U.S. 427, with the use by one party to make an accurate record of a conversation about which that party later testified."

The Court particularly pointed out the authorization and strict supervision of the judges and that the use of the recorder was necessary to protect the integrity of their court, which was being undermined.

In the instant case, Sussman, a narcotic addict, a false friend of Marchese, a stool pidgeon, referred to by the Government as a special employee, was equipped when he entered Marchese's apartment, not with a tape recorder as were the officers in *Lopez* and *Osborn*, but, with a transmitting device. At first he testified that he was told that the transmitter had a recording mechanism which would record what he was

saying, that they would take it down later and he would sign it after he heard it. Later, after noon recess, he changed his testimony and said there was no recording on tape. If no recording on tape was made and the officers denied that there was and that they made notes of such portions of the conversation which they could hear, then the *Osborn* case is clearly inapposite. Moreover, both in *Lopez* and *Osborn*, the conversations were with officers and the defendants could reasonably assume that what they said might be used against them. This, in itself, distinguishes the instant case.

This Court completely overlooked the implication of *Lopez*, where the decision was based on a distinction considered to exist by the majority of the Supreme Court Justices between the use of a tape recorder and a transmitting device. As pointed out in the concurring opinion of Justice Warren and the dissenting opinions, the use of a hidden electronic transmitting device, permitted in *On Lee v. United States*, 343 U.S. 747, was now forbidden. The Courts in the cases of *Hadju v. United States*, 189 F. 2d 230 (Fla), and *United States v. Stone*, 232 F. Supp. 296, expressed the same views as to the interpretation of the *Lopez* case as we do; that while a tape from a recording device may be used for corroboration purposes only, the use of the transmitter was a violation of the rights of the Fourth Amendment. This Court made no mention in its opinion either of the *Lopez* case or the aforesaid cases, but made its holding on an erroneous interpretation of *Osborn*.

II. THE COURT ERRONEOUSLY STATED THAT JUDGE CLARKE DENIED THE MOTIONS OF APPELLANTS.

This view was based on a misreading of Judge Clarke's order. He denied the motion to file Amended Findings, Conclusions and Judgment *without prejudice pending further clarification* by the Circuit Court of its opinion, and certified the matter for further clarification.



He did not deny the motion as an alternative new motion under Sections 2243 and 2255 of Title 28 U.S.C. but *reserved the determination* of such questions on the merits until such clarification.

III. THE COURT WAS IN ERROR IN HOLDING THAT ITS OPINION OF FEBRUARY 10, 1965, WAS "LAW OF THE CASE."

The rule of the "law of the case" is not absolute as *res judicata* but only a matter of policy to be disregarded at the Court's discretion when to follow it would result in injustice. The Court ignored the cases cited in our briefs to that effect, and the rule should be disregarded when constitutional rights of defendants are involved. We submit that this Court should correct its former erroneous decision, at least so far as the violation of appellants' rights of privacy and discharge therefor are concerned.

IV. THIS COURT REFUSED TO CONSIDER THE EFFECT OF THE GRANTING *CERTIORARI* BY THE SUPREME COURT IN *KATZ v. UNITED STATES*, 369 F. 2d 130, WHEREIN A TRANSMITTING DEVICE WAS USED.

The facts in favor of *Katz* are not as strong as in this case, for the secret transmitting was made from Marchese's apartment, whereas in *Katz* the transmitting was made from a public telephone booth. This Court implied that the decision in *Katz* might have no retroactive application. However, the non-retroactivity should not be applied to situations where the matter has been brought to the attention of the courts both at trial and on appeal.

V. THIS COURT ERRONEOUSLY STATED THAT APPELLANTS' FREEDOM ON BAIL WAS A "SAD COMMENTARY ON HOW DELAYS CAN BE ACHIEVED THAT DESTROY IN THE CERTAINTY OF PUNISHMENT FOR CRIME."

The Court overlooked or ignored the following matters:

(1) When Judge Clarke discharged appellants, they had already served 4-1/2 years in prison, and by reason of their excellent prison records, under the prison rules, they had already established enough good time to make up for more than one-half of their 10-year sentence. Except for provision in the narcotic laws prohibiting parole, they would long since

have been eligible for parole.

(2) The order of discharge was made only after the Supreme Court had reversed this Court and sent the case back for reconsideration by the *District Court*.

(3) The Government itself engaged in dilatory tactics in perfecting and prosecuting its appeal from the order, being twice in default, and motions by Marchese and Del Bono to dismiss were denied by this Court. The Government filed its opening brief ten months after the order, and this Court had the appeal under submission for about five months. The Supreme Court did not deny *certiorari* until eight months after petition was filed. On the last appeal this Court had the matter under submission for six months. At all times appellants have been diligent in prosecuting the proceedings.

(4) The granting of *certiorari* and reversal of this Court in 1963 had considerable significance in that it took place only two weeks after the *Lopez* decision. On the other hand, the denial of *certiorari* on the last petition imported neither approval nor disapproval of this Court's decision. (*Maryland v. Baltimore etc.*, 338 U.S. 912.)

(5) Since the freedom of appellants on bail was based on a discharge for violation of their constitutional rights, even though this Court disagreed, then they were entitled to be free, and to retain them in prison would be a travesty of justice, especially since they had already undergone considerable punishment through long imprisonment.

(6) Prior to the present decision, this Court has consistently avoided a direct ruling respecting the violation of appellants' constitutional rights of privacy through the use of hidden transmitter, and we submit its ruling now is based on an inapposite decision of the Supreme Court and a misinterpretation thereof.

We respectfully suggest that rehearing be granted and that the petitions be heard *en banc*, especially since the present panel - composed throughout by two of the same members - has consistently rendered decision adverse to appellants.

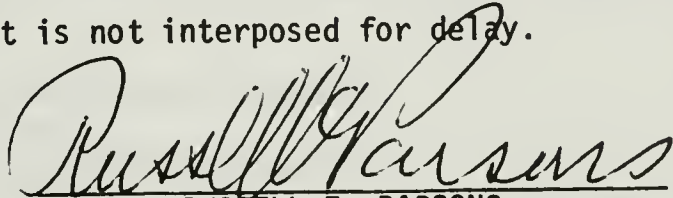
Respectfully submitted,

BURTON MARKS and BRUCE I. HOCHMAN
Attorneys for Michele Marchese

RUSSELL E. PARSONS
Attorney for Jesse Del Bono

CERTIFICATE OF COUNSEL

I, RUSSELL E. PARSONS, hereby certify on behalf of
Burton Marks and Bruce I. Hochman, attorneys for Michele
Marchese, and for myself as attorney for Jesse Del Bono,
that in my judgment the Petition for Rehearing is well
founded and that it is not interposed for delay.

A handwritten signature in cursive script, reading "Russell E. Parsons", written over a horizontal line.

RUSSELL E. PARSONS
Attorney for Jesse Del Bono
and on behalf of
BURTON MARKS and BRUCE I. HOCHMAN
Attorneys for Michele Marchese

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
County of Los Angeles) ss.

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Los Angeles, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 215 West Fifth Street, Los Angeles, California 90013, that on June 8th, 1967, I served the within PETITION FOR REHEARING (No. 20,893 - MARCHESE and DEL BONO) on the following named parties by depositing the designated copies thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, United States Court of Appeals
For the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101 - Original & 20 copies

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California - 3 copies

I further declare that concurrent with the above service I did serve MOTION TO WITHHOLD JUDGMENT AND MANDATE AND TO STAY EXECUTION OF JUDGMENT; AFFIDAVIT OR RUSSELL E. PARSONS and BURTON MARKS (No. 20,893 - MARCHESE and DEL BONO) on the following named parties by depositing the designated copies thereof, inclosed in the aforesaid sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Los Angeles, California, addressed to said parties at the addresses as follows:

Clerk, United States Court of Appeals
For the Ninth Circuit
U. S. Post Office and Court House Bldg.
San Francisco, California 94101 - Original & 3 copies

United States Attorney
Sixth Floor, Federal Building
Los Angeles, California - 1 copy

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8th, 1967, at Los Angeles, California.

Signature

Subscribed and sworn to before me
this day of June, 1967.

Notary Public in and for
the State of California

DEAN-STANDEFER
215 West Fifth Street
Los Angeles, California
MAdison 8-6898

The American Medical Association is a non-profit corporation organized for the purpose of promoting the interests of the medical profession and the public. It was organized in 1847 and has since that time been the leading organization of the medical profession in the United States.

The Association's primary purpose is to advance the science and art of medicine, to improve the medical education of the people, and to protect the public from quackery and other unscientific practices. It does this by publishing the Journal of the American Medical Association, by holding annual meetings, and by maintaining a permanent office in Washington, D. C.

The Association is composed of more than 40,000 members, who are organized into local, state, and national societies. These societies are the primary means by which the Association carries out its purposes. The local societies are the most important, as they are the closest to the medical profession and the public.

The Association's work is carried out through its various departments, which are headed by officers elected by the members. These officers are responsible for the Association's affairs and for the execution of its policies. The Association's work is also carried out through its various committees and subcommittees, which are appointed by the officers.

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